



July 2, 2001

Ms. Lamis A. Safa  
Assistant City Attorney  
City of Houston - Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR2001-2837

Dear Ms. Safa:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148965.

The City of Houston (the "city") received a request for the following three categories of information:

- 1) Month by month report cover sheet submitted by waste transporters with manifest numbers. (For period of last five years).
- 2) Liquid waste manifest system records with the following information: TDH, company, address, phone number, capacity, date loaded, date unloaded, disposal, manifest number, permit number, truck, volume, etc. (For period of last 5 years).
- 3) U.S. Liquids' air quality file HG-5304-E (2 files).

In response to this request, the city notified those entities whose proprietary interests might be implicated by the request of their right to submit comments to this office pursuant to

section 552.305 of the Government Code.<sup>1</sup> This office received responses from Daily Sand & Gravel, Inc., ("Daily"), GTM Services, Inc. ("GTM"), Groce Co., Inc. ("Groce"), Terminix Commercial, ("Terminix"), Aqua-Zyme Services, Inc. ("Aqua-Zyme"), Ramco Container System ("Ramco"), Houston Harris County Septic Tank Service ("HHCSTS"), Magna-Flow Environmental ("Magna-Flow"), January Transport, Inc. ("January"), Premier Companies, Inc. ("Premier"), Bedford Investments, Inc. ("Bedford"), and U.S. Liquids, Inc. ("U.S. Liquids"). In addition, counsel for the requestor also submitted comments to this office. *See* Gov't Code § 552.304.

Subsequently, the requestor narrowed her original request by withdrawing categories one and three of the request, and amending category two by instructing the city to "[r]edact from the data base the names or other identifying information of the 'customers' defined herein as the names of all restaurants or other establishments that have a grease or grit trap registered with the [city]. (This redaction will fully protect the customer list that the transporters claim as proprietary)." On the basis of this narrowed request, by letter dated May 15, 2001, the city notified the companies with possible proprietary interests that

the names and other information that would identify restaurants or other establishments, is no longer requested. In other words, your customer list is no longer being requested. Thus it is no longer necessary for you to submit a legal briefing to the attorney general because the identity of your customers is no longer being requested and will not be released . . . . By copy of this letter, the attorney general's office is being notified that the request has been modified to exclude all information that might have been considered proprietary.

By letter dated May 23, 2001, however, the city notified this office that U.S. Liquids still opposes release of information responsive to the amended request. Therefore, the city submitted a five-page representative sample of information responsive to the amended request,<sup>2</sup> and states that it will not release such information until this office rules on whether it is excepted from disclosure under section 552.110 of the Government Code. Although the city makes no arguments in support of the section 552.110 claim, U.S. Liquids argues that even under the amended request, the responsive information would still reveal the identities

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<sup>1</sup>*See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances)

<sup>2</sup>We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

of transporters of liquid waste, the volume of waste that each transporter delivers, and the disposal site. U.S. Liquids argues that release of these categories of information would competitively harm its disposal division, and therefore such information is protected under section 552.110.<sup>3</sup>

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, arguing the commercial or financial aspect of section 552.110 must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

U.S. Liquids first argues that the above-referenced categories of information, in compiled form, constitute trade secrets. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also Open Records Decision No. 552 at 2* (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757

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<sup>3</sup>Because we understand that the information in Exhibits 3 through 6 has either been released or is not in a form that is responsive to the amended request, this decision only addresses the information in the submitted representative sample.

cmt. b (1939).<sup>4</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Upon review of the arguments submitted by U.S. Liquids, we find that U.S. Liquids has made a *prima facie* demonstration that a compilation of the names or other identifying information of transporters of waste to U.S. Liquids' disposal site constitutes a trade secret. We acknowledge the requestor's argument that the city has previously provided to the requestor the identities of all of the transporters of waste that are at issue in this request, and that the names of such haulers are public record since they must be licensed. We find, however, that the compilation of such information in the manner that is responsive to this request constitutes the type of information that meets the definition of a trade secret, and that U.S. Liquids has met its burden in establishing trade secret protection for such information. *See e.g.*, Open Records Decision No. 669 at 3 (2000) (compilation may constitute a trade secret, even if derived, in part, from public record).<sup>5</sup> We find, however, that the volume of waste transported and the disposal site are not categories of information that meet the definition of a trade secret in that these categories of information pertain to "single or ephemeral events in the conduct of [U.S. Liquids'] business." Thus, we next address U.S. Liquids' section 552.110(b) assertion with respect to the volume of waste transported and disposal site.

As noted above, for information to be excepted under section 552.110(b), there must be a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. U.S. Liquids essentially

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<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

<sup>5</sup>We acknowledge the requestor's argument that there is ongoing litigation between the requestor and U.S. Liquids, and that the information "is necessary for the plaintiffs to develop the facts in the antitrust action against the US Liquids defendants." We note, however, that the Public Information Act is concerned with the release of information to the public in general, and forbids any consideration of the purpose for which such information will be used. Gov't Code § 552.222(b).

argues that divulging the volume transported and disposal site *for each transporter* would cause it substantial competitive harm because competitors could thereby deduce the identities of its largest transportation customers and offer those customers a lower rate than that charged by U.S. Liquids. We find, however, that where the names of, or other information that directly identifies, the transporters are withheld under section 552.110(a) as provided above, this argument does not demonstrate any likelihood of substantial competitive harm. U.S. liquids has not demonstrated how release of the volume of waste transported and the disposal site, by themselves and not in connection with the identity of the transporter, reveals either the identities of, or the volume transported by, any particular transporter of liquid waste. Accordingly, the remaining two categories are not excepted from disclosure under section 552.110(b) and must be released.

In summary, the city must withhold pursuant to section 552.110(a) the identities of transporters derived from manifests submitted to the city by U.S. Liquids. The information to be withheld is any that would directly identify transporters of waste to U.S. Liquids' Houston disposal site contained in the representative sample of information submitted to this office, excluding information as to the volume transported. We find that none of the other entities who submitted comments to this office established that responsive information pertaining to these entities is excepted from disclosure, to the extent such entities still have proprietary information at issue subsequent to the amended request. Therefore, the remaining information responsive to the amended request is not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 148965

Enc. Submitted documents

c: Ms. Mary Wimbish  
Downstream Environmental, L.L.C.  
2044 Bissonnet  
Houston, Texas 77005  
(w/o enclosures)